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MAR 21 1983

Nos. 82-185, 82-246, 82-259

IN THE

Supreme Court of the United States

October Term, 1982

BOSTON FIREFIGHTERS UNION, LOCAL 718,
Petitioner,

v.

BOSTON CHAPTER, NAACP, *et al.*,
Respondents.

BOSTON POLICE PATROLMEN'S ASSOCIATION, INC.,
Petitioner,

v.

PEDRO CASTRO, *et al.*,
Respondents.

NANCY B. BEECHER, *et al.*,
Petitioners,

v.

BOSTON CHAPTER, NAACP, *et al.*,
Respondents.

On Writs of Certiorari to the United States Court of Appeals for the First Circuit

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF OF THE AMERICAN JEWISH CONGRESS, AMICUS CURIAE, IN SUPPORT OF RESPONDENTS

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QUESTIONS PRESENTED

1. May a court modify a senority statute on lay-offs in order to preserve progress under a court ordered affirmative action program, when unforeseen circumstances develop and literal application of the statute would undo that progress.

2. Should the courts below have ordered the parties first to explore all alternatives to lay-off including those which would have added financial burdens to the municipality before resolving the conflict between the seniority statute and the affirmative action order.

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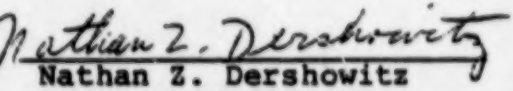
MOTION OF THE AMERICAN JEWISH CONGRESS FOR LEAVE TO FILE A BRIEF AMICUS CURIAE OUT OF TIME

The undersigned, counsel for the American Jewish Congress, respectfully moves this Court for leave to file out of time the accompanying brief amicus curiae in support of the respondents. The parties to the case originally consented to the filing of a brief but, for the reasons set forth in the attached affidavit of Howard M. Squadron, the American Jewish Congress

was unable to prepare and file its brief within the time permitted by the rules of this Court.

The American Jewish Congress believes that its brief makes a unique contribution to the discussion of the important issues involved in this case.

Respectfully submitted,



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AFFIDAVIT

HOWARD M. SQUADRON, being duly sworn, deposes and says:

1. I am the President of the American Jewish Congress.

2. I make this affidavit in support of the application for leave to file this brief amicus curiae out of time.

3. The issues involved in this case are ones of extraordinary significance to the American Jewish Congress. The issues

have been debated extensively by the Executive Committee of the American Jewish Congress, the highest policy-making body of the organization that meets on a regular basis.

4. An effort was made to prepare a brief for submission within the time allowed under the rules of the Supreme Court. Originally, the consent of the parties to file a brief amicus curiae was obtained.

5. However, it became necessary for officers actively involved in the issues to come from many different parts of the country to a meeting in order to decide on the parameters of the brief to be submitted to this Court. That determination was finally made at an extraordinary meeting held on March 7, 1983.

6. Upon the belief that the brief submitted herewith makes a unique contribution to the consideration of this case, we seek permission to file this brief out of time.

Howard M. Squadron

Howard M. Squadron

Sworn to before me
this 17 day of March, 1983

Bob Rappaport

BOB S. RAPPAPORT
Notary Public State of New York
No. 31-4741341
Qualified in New York County
Commission Expires March 30, 1983

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INTEREST OF THE AMICUS

The American Jewish Congress is a national organization of American Jews founded in 1918 and concerned with the preservation of the security and constitutional rights of all Americans. Since its creation, it has vigorously opposed racial and religious discrimination in employment, education, housing and public accommodations and has supported programs which would increase opportunities for disadvantaged minorities to speed the day when all Americans may enjoy full equality without regard to race.

Consent to file this brief had been obtained but the brief was not filed in a timely fashion. Leave to file is therefore being sought by motion.

STATEMENT OF THE CASE

The amicus adopts the statement of the case contained in the brief amici filed by Robert Lipshutz, et al.

SUMMARY OF ARGUMENT

This case presents the painfully difficult question of who should suffer most from lay-offs resulting from the passage in Massachussets of a tax limitation and expenditure measure, commonly called Proposition 2-1/2. On the one hand, laying off minority workers hired in increased numbers under a court ordered affirmative action program is inconsistent with our nation's commitment of the highest order, to eradicate all vestiges of discrimination. On the other hand, laying off employees out of sequence required by the bona fide seniority provisions embodied in the Massachusetts civil service statute and protected against challenge by Title VII is inconsistent with senior employees federally and state protected rights the preservation of which also reflects a strong public commitment.

Upon the assumption that the court was required to resolve the stark conflict between these competing values the court modified the state seniority requirements and incorporated an affirmative action component onto the statute.

Given the Court's assumption, as we argue below, its decision can be justified as a matter of law.

But we believe the resolution of the conflict in such stark terms was an inappropriate way to approach the issue. Rather, alternatives to avoid the conflict between seniority rights and preservation of the Court's decree should have been explored. The record is devoid of any such exploration.

We submit that the courts below should have imposed upon the parties the obligation of devising and exploring such alternatives, and, if no satisfactory proposal was advanced by the parties the

court should have determined on its own whether less painful and more equitable alternatives were available.

Thus, for example, work sharing plans, reduced work weeks, elimination of overtime, payless holidays, rotational lay-offs and attrition plans were never explored or evaluated by the parties or the Court.

We submit further that fiscal restraints imposed by Proposition 2-1/2 were not inviolate. The courts below had the legal power to, and should have, interpreted or if necessary superseded state law which infringed upon constitutional and other rights of the employees embodied in the affirmative action order and state and federally protected seniority rights.

ARGUMENT

Introduction*

The American Jewish Congress believes that the orders appealed from are within the equitable discretion of the Court, and are barred by neither Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e, nor the Constitution. The order below was within the district court's discretion, for the ultimate and "highest priority" is the eradication of discrimination and "the discriminatory effects of the past." Franks v. Bowman, 424 U.S. 747, 763 (1976); Albemarle Paper Co. v. Moody, 422 U.S. 405, 418 (1975).

However, the District Court should have required the defendants to have explored, or should itself have explored, means of avoiding the head-on clash between

* The Introduction and Part A of Point I essentially replicate the Introduction and Point A of the brief amici of Robert Lipschutz, et al.

seniority protections and the minority rights given by Title VII. Such means were in fact available, since the laid-off workers have now actually been reinstated. This Court should now settle the law by requiring lower courts in matters of this kind to explore and, if necessary, to direct alternative approaches. Such approaches can include, in our view, retrenchment, reallocating available resources, worksharing and the like, or even superseding local laws limiting expenditures where necessary to preserve constitutionally protected anti-discrimination rights and seniority rights protected by federal and state law.

POINT I

THE MODIFICATION WAS WITHIN THE EQUITABLE DISCRETION OF THE COURT.

A. Equitable principles permit overriding literal application of the seniority statute.

The district court in this case confronted one of the most troubling

dilemmas facing our society today: how to distribute the pains of recession and fiscal austerity so as to prevent reversal of the modest gains made in the struggle against discrimination while not unfairly burdening innocent members of nonminority groups.

Recession hurts many people, but minorities suffer the most. Because our nation has only recently undertaken to redress the centuries of segregation and discrimination, minorities have the shortest length of service and when fiscal restraints force cutbacks, they are the first to be laid off. "Layoffs by seniority 'lock in' the effects of past discrimination by continuing the advantage white males gained in employment by not having to compete with women and minorities." United States Commission on Civil Rights, Last Hired, First Fired:

Layoffs and Civil Rights 36 (1977).*

* The Commission found that fiscal cutbacks caused by the 1974-75 recession had a devasting effect on minorities in local government:

> The recent recession has had a critical impact on minorities and women. Many had only recently obtained their first promising jobs. Increasing numbers had begun to penetrate employment areas of great importance in our society, such as State and local government. Because they have not had time to acquire adequate seniority, however, minority members and women have been affected disproportionately by the personnel cutbacks occasioned by this recession, and much of their limited progress has thereby been obliterated. In light of dismal predictions of slow economic recovery and continuing high unemployment, this recession threatens to lock these groups into place as a permanent, expendable economic and social underclass.
>
> * * *
>
> In New York City, layoffs in mid-1975 of 371 female officers appointed since January 1973 by the New York City Police Department ended their brief tenure with the previously overwhelmingly male police force. Over half of all Hispanic city workers in New York lost their jobs between July 1974 and November 1975.

If unemployment remains high, and the "last hired first fired" approach continues to be widely followed, the modest progress achieved under Title VII and the Constitution in eliminating employment discrimination and its effects, will be undone. See id. at 60-61.

There may be no painless options, however, and in the end someone may have to pay a price. Even if conventional seniority governs and older white workers keep their jobs,* the more recently hired blacks will lose theirs. There is no objective calculus by which to calibrate which group will suffer more from such layoffs, and no criteria by which to judge whose suffering is more unfair or painful.

Last Hired, First Fired 60-61, 25-26.

* Some senior workers will lose their jobs in any event because of the veterans and perhaps other preferences under Mass. Ann. L. ch. 30, § 9A (1979). See Sol. Gen. Br. 8 n.7 and 11, infra.

Certain basic principles govern, however:

(1) The eradication of discrimination and "the discriminatory effects of the past," Albermarle Paper v. Moody, 422 U.S. at 418, is the "primary objective" of Title VII, Franks v. Bowman, 424 U.S. at 768, n.28, and represents a national commitment of the "highest priority." Id. at 673.

(2) District courts are empowered under § 706(g) with "wide discretion . . . to fashion the most complete relief possible," Franks v. Bowman, 424 U.S. at 785; Int'l Bd. of Teamsters v. United States, 431 U.S. 324, 361, 365 n.51 (1977), in order to "allow the most complete achievement" of that "highest priority." Franks v. Bowman, 424 U.S. at 770-71. This discretion includes the authority to modify a still-operative decree when circumstances change, in order to preserve and promote

its purposes. United States v. United Shoe Corp., 391 U.S. 244 (1968); United States v. Swift, 286 U.S. 106, 119 (1932); cf. Wright v. City of Emporia, 407 U.S. 451 (1972). If the original decree was legitimate, then a modification to prevent its undoing is equally legitimate.

(3) Seniority is a very important value. It is not a vested right, however, only an expectation, Franks v. Bowman, 424 U.S. at 778-79; Ford Motor Co. v. Huffman, 345 U.S. 330 (1953), and it is frequently overridden or modified to protect other interests, including the eradication of the effects of discrimination.

The first two points are well-established and need little discussion. The third, however, warrants some elaboration.

"This Court has long held that employee expectations arising from a seniority system agreement may be modified

by statutes furthering a strong public policy interest." Franks v. Bowman, 424 U.S. at 778. In this very case, for example, seniority is not the dominant determinant with respect to lay-offs -- the veterans preferences created by Mass. Ann. L. ch. 30, § 9A, take precedence, and this has significantly affected who was laid off.* And the veterans preference is quite common. Franks v. Bowman, 424 U.S. at 778; Ford Motor Co. v. Huffman, supra, (agreement on veterans preference). Overcoming the effects of racial

* It appears that because of two large hiring waves in 1977-78 and 1979-80, a potential layoff of 252 police officers would normally mean at most a variance of only about two years or so between the most junior minority retained and the most senior nonminority laid off, if seniority were the only factor. The reason that the layoffs reached 19 white officers hired in 1970 is because of the Massachusetts statutory veterans preference. See Joint App. 90a; Sol. Gen. Br. 8 n.7. In the firefighters situation, there may be only a one-year difference between the most senior nonminority fired and the most junior minority retained.

discrimination has also justified an override of seniority expectations, Franks v. Bowman, 424 U.S. at 779, either through "constructive seniority" as in Franks, or by agreement. United Steelworkers v. Weber, 443 U.S. 193, 198-99 (1979); Savannah Printing Specialties v. Union Camp Corp., 350 F. Supp. 632 (S. D. Ga. 1972). Seniority may also be overridden by special preferences for union chairmen and other union officials. Aeronautical Lodge v. Campbell, 337 U.S. 521, 526-27 (1949).

Indeed, seniority systems include so wide a variety of definitions, restrictions, conditions, and qualifications, and vary so greatly as to when seniority begins, how it is lost, what it covers, what it is subject to, how it is

compiled, and more,* that modifying a particular system to prevent reversal of some modest gains for a federal policy of the "highest priority," seems well within a court's equity discretion. Indeed, a statute or a voluntary union-employer agreement could so modify it. United Steelworkers v. Weber, supra, Tangren v. Wackenhut, 480 F. Supp. 539 (D. Nev. 1979), aff'd, 658 F.2d 705 (9th Cir. 1981), cert. denied, 102 S. Ct. 1771 (1982); Savannah Printing Specialties v. Union Camp Corp., supra. In the cases at bar, both the district and appellate courts -- which have lived closely with these cases for over a decade -- noted that if they and the parties had forseen that the decree might

* See Aaron, Reflections on the Legal Nature and Enforceability of Seniority Rights, 75 Harv. L. Rev. 1532, 1534 (1962); Amer. Tobacco Co. v. Patterson, 102 S.Ct. 1534, 1536 (1982) (promotions based on seniority plus certain qualifications); Calif. Brewers Ass'n v. Bryant, 444 U.S. 598, 606-08 (1980).

be undercut by recession-induced layoffs, the order would have initially provided for the kind of seniority modification ordered by the district court in 1981. Jt. App. 28, 25.

Of course, seniority should not be lightly overridden. As the cases cited by petitioners indicate,* seniority has a very high value. For that very reason, the courts below had an obligation, as a matter of law, which was not fulfilled -- i.e., to explore and direct the implementation of other alternatives. Indeed, we believe the courts below had the power and obligation to supersede Proposition 2-1/2, if necessary.

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* The cases are distinguishable, however. For example, in Ford Motor Co. v. EEOC, 102 S.Ct. 305 (1982), the danger was that seniority would be adversely affected before discrimination was proven; here, it is already proven.

B. The Courts Below Should Have Considered Alternatives.

Before Boston was required to lay off police officers on a racial basis, the District Court should have required a showing that there were no alternatives, such as those suggested below, to the use of dual seniority lists.

Perhaps none of these alternatives standing alone would have been sufficient to prevent all layoffs. Taken together, they might have substantially reduced the need for layoffs, perhaps to the point where the racial impact was not so devastating that it need have been "cured" at all. Perhaps none of these would have worked. But if that is so, then the race-based layoffs would at least have been -- and been perceived as -- the least restrictive alternative, a prerequisite under University of California Regents v.

Bakke, 438 U.S. 265 (1978), and Fullilove v. Klutznick, 448 U.S. 448 (1980), for the use of racial criteria.

Moreover, this requirement that alternatives be considered is not only a requirement of federal constitutional law. Rather, it stems from the requirements of Title VII itself. The decision to reduce costs by means of layoffs, as opposed to the use of other cost-cutting alternatives,* is itself a decision about "the terms and condition of employment" subject to the Griggs rule that an employment decision which has a disparate

* In NAACP v. D.P.O.A., 525 F. Supp. 1215 (E.D. Mich. 1981), black police officers sued the police union for not considering givebacks as an alternative to last hired, first fired layoffs, which would impact most heavily on newly hired blacks. The theory was a breach of the duty of fair representation owed minority employees. The union defended citing the seniority provisions of Title VII. The Court refused the union's motion to dismiss, and set the matter for trial.

impact on minorities is illegal,* unless justified by business necessity. See Blumrosen & Blumrosen, The Duty to Plan For Fair Employment Revisited: Work Sharing In Hard Times, 28 Rutgers L. Rev. 1082 (1975); (hereafter Duty to Plan); Summers and Love, Work Sharing As An Alternative to Layoffs By Seniority: Title VII Remedies in Recession, 124 U. Penn. L. Rev. 893 (1976);

* The New York City Commission on Human Rights in 1975 issued an "interpretive memo" stating that employers were under a legal duty to explore alternatives to "last hired, first fired" layoffs which had a disparate impact on minorities.

(hereafter Recession Remedies).*

Numerous alternatives have been suggested by the commentators as an alternative to last hired, first fired layoffs as a means of reducing labor costs. Of course, as we argue elsewhere in this brief, Point C, infra, it is not clear that Boston should be permitted to use the lack of funds as a basis for shifting the burden of remedying its illegal actions. But even if it is, use of these alternatives in this

* Additional authorities who support exploration of alternatives in place of last hired, first fired layoffs include: Stacy, Title VII Seniority Remedies In A Time of Economic Downturn, 28 Vanderbilt L. Rev. 4876 (1975); Silbergold, Title VII & the Collective Bargaining Agreement: Seniority Under Fire, 49 Temple L. Q. 288 (1976); Fix, Plant Seniority & Minority Employees: Title VII's Effect on Layoffs, 47 Col. L. Rev. 73 (1976); Elkiss, Modifying Seniority Systems Which Perpetuate Past Discrimination, 31 Labor L. Jnl. 37 (1980); Wood, Equal Employment Opportunity and Seniority: Rights In Conflict, 26 Labor L. Jnl. 3345 (1975); Thorp, Racial Discrimination and Seniority, 23 Labor L. Jnl. 398 (1972); Waerdt, Affirmative Action and Tenure, 11 Jnl. L. and Educ. 507 (1982).

case would have eliminated the adverse impact on newly hired minority officers, and would have also eliminated the need for race based layoffs to the disadvantage of white employees. While these alternatives would not have been cost free, they would have avoided or minimized the need for consideration of race, a uniquely onerous burden under the Constitution.

Two distinct types of alternatives suggest themselves. First, the District Court should have explored the possibility that a reallocation of funds from other municipal activities -- or other aspects of the Police Department budget -- would have eliminated or ameliorated the need for layoffs of police officers.* Perhaps, too, the "crisis" would have resolved itself simply through normal attrition.

Second, even if it was determined that layoffs of police officers were necessary, the Court should have considered

alternatives which spread the effect of the layoffs more broadly, and which, consistent with the basic thrust of § 703(h), did not subordinate the rights of older white workers to minority workers. The alternatives of this type which at least should have been examined by the District Court and the parties include:

(a) Worksharing -- that is, the imposition of reduced hours for all employees, so that all might retain most of their income. This practice is widespread in several industries, notably the needletrades and furniture, as a means of allocating scarce work and fairly distributing hardships. Other instances of it have been reported. See, e.g., ¶443.59 F.E.P.; (Diamond International Corp.); N. Y. Times 5/18/75 §4 at 8 col. 2 (N. Y. Telephone).

There have, indeed, been numerous arbitration decisions addressing the

question of whether worksharing is inconsistent with collective bargaining agreements calling for last hired, first fired layoffs. The results are mixed, Recession Remedies, supra, 124 U. Penn. L. Rev. at 903 n.32., but the trend is towards finding no inconsistency.

While it has been found that worksharing is feasible only when the work week remains at 30-32 hours, Wines, Seniority, Recession and Affirmative Action: The Challenge for Collective Bargaining, 20 Amer Bus. L. J. 371 (1982), that is not an obstacle in this case, where less than a fifth of Boston's police officers were laid off.* Use of worksharing in the police context is also not unprecedented. The U. S. Civil Service Commission report, Last Hired, First Fired:

* Wines also cites studies showing that 20 percent of collective bargaining agreements in effect in 1973 called for work sharing. This percentage reached 67 percent in the furniture industry.

Layoffs and Civil Rights (1977), notes that the Detroit police department resorted to payless days to avoid the need for layoffs of minority workers.

(b) Rotating Layoffs -- Some have suggested that all employees be laid off for short periods of time, instead of indefinite layoffs of a few. There are several advantages of this scheme over long term layoffs -- most notably that each employee retains health insurance and pension benefits. Moreover, because the layoff is total (as is not the case with worksharing) employees are eligible for unemployment insurance, thus reducing the financial pinch imposed.

(c) Givebacks -- The parties could have considered cutbacks in salaries and frin e benefits (particularly vacations and personal days) with the savings used to retain other employees. Such

renegotiations of the union contract are today hardly uncommon.

(d) Early retirement -- The city might have been ordered to explore the possibility of making early retirement more attractive to older workers. One of the particular drawbacks of the scheme ordered by the Distict Court is that the workers most likely to have benefitted from the prior discrimination are not those laid off, while those who competed against blacks fairly are laid off. Making early retirement attractive (as by allowing fictional service credits) would allow for the preservation of jobs for those people who did compete fairly, and would place the costs of discrimination where they ought to be -- on Boston and its taxpayers.

Another advantage of early retirement is that it ameliorates one of the worst features of seniority based layoffs -- the discharging of young

aggressive workers instead of older, more settled ones. This alternative would make permanent the minority percentage gains on the police force, and would end the need for "quotas" at an earlier date.

(e) A variation on early retirement would be the compulsory retirement of persons already eligible for retirement pensions. This is particularly attractive for civil servants (particularly police and fire), where pensions typically allow for 20 years and out.

(f) Restrictions on overtime -- If Boston has some of its police and fire officers working scheduled overtime at premium pay, its elimination might save sufficient funds to avoid at least some layoffs. Of course, the nature of police (and fire) work is such that not all overtime could be eliminated.

(g) Voluntary layoffs (leave) -- Some employees might want to take

additional unpaid time off, whether for a few days or for several months.

(h) There is one other possibility which has not received any attention -- that of ordering Boston to pay damages to white officers laid off to maintain a complement of black officers. McAleer v. A.T.T., 416 F. Supp. 435 (D. D.C. 1976), relying on Chief Justice Burger's concurring opinion in Franks, held that such relief was appropriate. McAleer is attractive because it places the onus of correcting past discrimination on the guilty parties -- in this case, Boston and its taxpayers.

C. Proposition 2-1/2 Should Not Have Been Accorded Preferential Treatment and Permitted to Override the Decree and Seniority.

The dilemma which this case presents arises from a conflict among three different policies: the federal anti-discrimination policy, the state civil

service policy concerning seniority, and the state fiscal policy as expressed in Proposition 2-1/2. The courts below resolved this case by looking only at the clash between the first two policies; the third was viewed, implicitly, as beyond examination, perhaps because those courts believed they were powerless to order relief which would involve spending over the limits set by Proposition 2-1/2. In that, they erred.

It is a maxim that constitutional rights may not be denied for lack of funds. See, e.g., Bounds v. Smith, 430 U.S. 817, 824-25 (1977). A federal court, consistent with the Eleventh Amendment, may enjoin state officials to conform their future conduct to the requirements of federal law, even though such an injunction may have an ancillary effect on the state treasury. Quern v. Jordan, 440 U.S. 332, 337 (1979);

Edelman v. Jordan, 415 U.S. 651 (1974).* See also Milliken v. Bradley, 443 U.S. 267 (1977) (affirming order of district court compelling state to pay for purchase of school buses as part of court ordered desegregation plan).

State law may not frustrate the operation of federal law even though the state legislature in passing its law had some purpose in mind other than frustration. Perez v. Campbell, 402 U.S. 637 (1971). State policy must give way when it operates to hinder vindication of federal constitutional guarantees. North Carolina State Board of Education v. Swann, 402 U.S. 43, 45 (1971).

Federal courts have not hesitated to suspend the effectiveness of state statutes which have interfered with the

* The Eleventh Amendment stands as no bar. See Fitzpatrick v. Bitzer, 427 U.S. 445 (1976).

implementation of court decrees. Thus, in Gautreaux v. Chicago Housing Authority, 342 F. Supp. 827 (N.D. Ill. 1972), aff'd, 480 F.2d 210 (7th Cir. 1973), cert. denied, 414 U.S. 1144 (1974), the Housing Authority, under court order to increase the supply of housing as part of a desegregation plan, submitted proposed sites to the Chicago City Council as required by statute. When the Council refused to approve or even consider housing sites which the Authority had submitted, the court, finding that this had the effect of thwarting "correction of federal constitutional wrongs," suspended the statutory requirement of Council approval and replaced it with another approval mechanism. Similarly, in the course of Mississippi prison litigation, after the court prohibited acceptance of more prisoners in an overcrowded penitentiary, the state passed a statute requiring acceptance of all prisoners, and

the court thereupon issued a TRO against its enforcement. Gates v. Collier, 407 F. Supp. 117 (N.D. Miss. 1976), aff'd, 548 F.2d 1241 (5th Cir. 1977).

Proposition 2-1/2, purporting to limit the power to tax, may also be overridden if necessary to accomplish the aims of the decree. The federal courts have power to issue financing orders to secure individuals' constitutional rights to equal protection. In Griffin v. County School Board of Prince Edward County, 377 U.S. 218, 233 (1964), this Court said:

> [T]he District Court may, if necessary to prevent further racial discrimination, require the Supervisors to exercise the power that is theirs to levy taxes to raise funds adequate to reopen, operate, and maintain without racial discrimination a public school system in Prince Edward County like that operated in other counties in Virginia.

Cf. Virginia v. West Virginia, 246 U.S. 565 (1918) (discussing mandamus of state legislature to levy a tax to satisfy a

judgment recovered by sister state). See generally Comment, Enforcement of Judicial Financing Orders: Constitutional Rights in Search of a Remedy, 59 Geo. L. J. 393 (1970). But see United States v. County of Clark, 95 U.S. 769 (1874) (where county is taxing at maximum rate, mandamus cannot issue); Louisiana v. Jumel, 107 U.S. 711 (1883) (mandamus will not be issued for the release of money in the state treasury, without authorization and appropriation); Clay County v. McAleer, 115 U.S. 616, 618 (1885) (court cannot order taxing board to levy a tax in excess of maximum allowed where such tax is not enough to pay the judgment); United States v. County of Macon, 99 U.S. 582 (1879) (mandamus will not lie to compel the levy of a tax beyond the authorized amount).

While it is true that recent cases demonstrate that the courts are hesitant to order states or their political

subdivisions to raise and allocate sums of money and will explore all alternatives to such orders, including the shutting down of the offending institutions, see, e.g., Rhem v. Malcolm, 507 F.2d 333 (2d Cir. 1975); Welsch v. Likins, 550 F.2d 1122 (8th Cir. 1977); New York State Ass'n for Retarded Children, Inc. v. Carey, 631 F.2d 162 (2d Cir. 1980), it must be true, for the Supremacy Clause demands no less, that if such alternatives do not exist or would not be effective to remedy the Constitutional violation, the court is empowered to compel the states to raise and spend such funds as are necessary to remedy the violation. See Griffin v. County School Board of Prince Edward County, supra.*

* In June 1982 Massachusetts enacted legislation providing new revenues for Boston and requiring the recall of all laid off police and firefighters. This demonstrates that when more flexible alternatives are considered, methods can be devised for avoiding the painful conflict created by the clash between the principles underlying affirmative action and seniority.

Conclusion

For the above stated reasons, the judgment below should be affirmed but the order of the District Court should be modified to require consideration of alternate solutions in the event a conflict between the anti-discrimination remedy and other protected rights should arise in the future.

Respectfully submitted,

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